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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-291

AMERICAN MODULARS CORP.,
Respondent,

v.

EDGAR L. LINDLEY,
TAX COMMISSIONER OF OHIO,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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The Respondent, AMERICAN MODULARS CORP., respectfully prays that this Court deny Petitioner's petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on May 24, 1978.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. I, §8, cl. 3:

> The Congress shall have power . . .
>
> To regulate commerce with foreign nations and among the several states . . .

OHIO STATUTES INVOLVED

Ohio Rev. Code §5739.02

Ohio Rev. Code §5739.021

Ohio Rev. Code §5741.02

Ohio Rev. Code §5741.021

QUESTION PRESENTED FOR REVIEW

The question before the Court is whether the State of Ohio may, by a permissive county use tax, provide a direct economic advantage to local business by imposing upon the products of other states brought into Ohio for use a more onerous public burden than it imposes upon like products purchased within Ohio.

STATEMENT OF THE CASE

Between 1970 and 1973, Respondent, American Modulars Corporation, purchased tangible personal property from out of state (out of Ohio) and Ohio vendors for use in two Ohio counties, Montgomery and Hamilton, which levied, pursuant to R.C. §5739.021 and §5741.021, one-half percent sales and use taxes. Certain Ohio purchases were made from vendors located in counties which did not levy those taxes. On July 17, 1974, the Tax Commissioner of Ohio assessed a one-half percent use tax on Respondent's use of the property purchased out of state. Respondent was not assessed the one-half percent sales or use tax on its aforesaid Ohio purchases.

Pursuant to R.C. §5739.021 and §5741.021, Ohio has authorized Ohio counties to adopt, if they desire the additional revenue, permissive county sales and use taxes at a rate of one-half percent. In pertinent part, these sections provide as follows:

> R.C. §5739.021
>
> . . . any county may levy a tax at the rate of one-half of one percent in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale . . . made in the county . . .
>
> R.C. §5741.021
>
> . . . any county which levies a tax pursuant to section 5739.021 of the Revised Code *shall levy* a tax . . . in addition to that imposed by section 5741.02 of the Revised Code, on the storage, use, or other consumption in the county of tangible personal property, *which is subject to the tax levied by this state as provided in section 5741.02 of the Revised Code* . . . (Emphasis added)
>
> [§5741.02 is the Ohio state use tax.]

In Ohio, counties possess only such powers and privileges as may be delegated to or conferred upon them by statute. *Lake County v. Ashtabula County,* 24 Ohio St. 393 (1873); *Portage County v. Gates,* 83 Ohio St. 19, 93 N.E. 255 (1910). Pursuant to the authority delegated in R.C. §5741.021, counties can therefore levy a use tax only on the storage, use, or other consumption of property which is subject to the state use tax. With the exception of a purchase of tangible personal property within Ohio where the state sales tax should have been, but was not, paid, the state use tax is levied only on property purchased outside Ohio, not on property purchased within Ohio. R.C. §5741.02 (C) (1). Hence, the permissive use tax is a tax which, like the state use tax, is levied wholly because the property is purchased outside Ohio.[1]

Because approximately forty-two of the eighty-eight counties in Ohio have enacted the local permissive sales and use taxes, and the others have not, preferential trade areas are created that provide local purchases with commercial advantages. For instance, when a taxpayer located in a taxing county purchases materials from an Ohio vendor located in a non-taxing county, no local sales or use tax is levied: No local sales tax because the property is not purchased in a taxing Ohio county; and no local use tax because the property is purchased in Ohio, so that the state use tax does not apply. However, when this same taxpayer purchases the identical materials from out of state, a

1. This statement is true subject to the exception mentioned above with respect to the state use tax, R.C. §5741.02(C) (1), and to automobiles which are segregated for special statutory treatment. R.C. §5741.021.

local use tax must be levied on the transaction because the Ohio state use tax is levied upon it.

Respondent appealed the final assessment of the permissive use tax to the Ohio Board of Tax Appeals on Ohio and Federal constitutional grounds. The Ohio Board of Tax Appeals affirmed the Tax Commissioner's assessment of the permissive use tax because it is without jurisdiction to declare a statute or its application unconstitutional. *S. S. Kresge Co. v. Bowers,* 170 Ohio St. 405, 166 N.E. 2d 139 (1960). Respondent then appealed the decision to the Supreme Court of Ohio as of right.[2]

The question before the Court was whether the Ohio permissive county use tax burdens interstate commerce by discriminating against the acquisition of goods from outside the state for use in Ohio, contrary to the United States Constitution.

The Court decided the issue as follows:

> "Insofar as the application of R.C. 5741.021 imposes a higher tax rate on property purchased out of state and used in a taxing county than on similarly used property purchased in the state, that statute discriminates against interstate commerce and violates the Commerce Clause of the United States Constitution."
>
> *American Modulars Corp. v. Lindley,* 54 Ohio St. 2d 273, 376 N.E. 2d 575 (1978)

From this decision, the Petitioner has filed his petition for writ of certiorari.

2. R. C. §5717.04

REASONS FOR DENYING THE WRIT

The instant case presents no Federal question of substance that has not heretofore been considered by this Court. No matter how a state chooses to exercise its taxing power, whether it be by a state sales and use tax or by a permissive county sales and use tax adopted pursuant to state statute, the established rule of law is the same: No state may, consistent with the commerce clause, exercise such taxing power so as to discriminate against interstate commerce by providing a direct advantage to local business. *Halliburton Oil Well Cementing Company v. James S. Reily,* 373 U.S. 64, 10 L. Ed. 2d 202, 83 S. Ct. 1201 (1963); *Northwestern States Portland Cement Co. v. State of Minnesota,* 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357 (1959); *Harold H. Henneford, et al. v. Silas Mason Company, Inc.,* 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524 (1937); *Boston Stock Exchange, et al. v. State Tax Commission, et al.,* 429 U.S. 318, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977); *Sonneborn Brothers v. Cureton (Sonneborn Brothers v. Keeling),* 262 U.S. 506, 516, 67 L. Ed. 1095, 1100, 43 S. Ct. 643, 648 (1923); *M. M. Welton v. State of Missouri,* 91 U.S. 275, 23 L. Ed. 347 (1876). Such discrimination is unconstitutional even if it occurs merely in the *practical operation* of the statute. *Best & Company, Inc. v. A. J. Maxwell,* 311 U.S. 454, 85 L. Ed. 275, 61 S. Ct. 334 (1940).

Under Ohio law, counties may levy a one-half percent use tax on the storage, use, or other consumption in the county of tangible personal property. Because only some of the Ohio counties have enacted the tax, the statutory taxing scheme, as construed by the Supreme Court of Ohio, produces the following results:

> "Because goods used in taxing counties and purchased in non-taxing Ohio counties are not subject to a four and one-half percent tax even though identically used goods purchased out of state are so taxed, R.C. 5741.021 provides a direct commercial advantage to local purchases which impedes the free flow of trade between the states. *Freeman, supra.* [*Freeman v. Hewit,* 329 U.S. 249, 91 L. Ed. 265, 67 S. Ct. 274 (1946)] Indeed, R.C. 5741.021 discriminates against out-of-state acquisitions as invidiously as it would if it subjected those purchases to unfavorable tax bases (*Halliburton, supra; Robert Emett & Son Oil & Supply Co. v. Sullivan* [1969], 158 Conn. 234, 259 A. 2d 636; *Matthews v. State* [Colo. 1977], 462 P. 2d 415) or if there were no county sales tax at all. (See *Henneford, supra,* and *Gray v. Oklahoma Tax. Comm.* [Okla. 1963], 379 P. 2d 843.) Finally, the fact that R.C. 5741.021 discriminates against interstate commerce only in its practical effect does not bar a finding that it is unconstitutional. *Best & Co., supra.*"[3]
>
> *American Modulars Corp. v. Lindley,* 54 Ohio St. 2d 273, 278, 376 N.E. 2d 575, 578 (1978).

Having thus described the *practical operation* of the Ohio permissive county use tax, the Ohio Supreme Court, correctly construing the above-cited decisions of this Court, properly held as follows:

> "We, therefore, hold that R.C. 5741.021 is unconstitutional insofar as its application imposes a higher tax rate on property purchased out of state and

3. The rate of Ohio's state sales and use taxes is 4%; thus, in counties which have levied the county permissive taxes the combined rate is 4½%. Both taxes are assessed and enforced by the State Tax Commissioner. R.C. §5741.06.

used in a taxing county than on similarly used property purchased in the state."

American Modulars Corp., supra, at 278, 376 N.E. 2d at 578.

Petitioner makes several allegations that confuse the issue before the Court. The question is not whether Ohio has achieved as much equality under the present system as is administratively feasible; neither is it whether a different taxing scheme would withstand an equal protection attack, nor whether another permissive use tax under a different statute provides the necessary revenue to operate a transit system. Rather, the question is whether the present system will survive constitutional scrutiny. Following the principles established by this Court, the Ohio Supreme Court unanimously held that it did not.

CONCLUSION

The Ohio Supreme Court found, as a matter of law, that R.C. §5741.021 discriminated against interstate commerce by providing a direct commercial advantage to goods purchased in Ohio. Construing the decisions of this Court which hold that no state may, consistent with the commerce clause, impose a tax that provides a commercial advantage to local business, the Supreme Court of Ohio held that R.C. §5741.021 is unconstitutional insofar as its application imposes a higher tax on property purchased out of state and used in a taxing county than on similarly used property purchased in the state. In so holding, the Supreme Court of Ohio considered no Federal question of substance not heretofore determined by this Court and it decided the case in accordance with the applicable decisions of this Court. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, C. Emory Glander, one of the attorneys for American Modulars Corp., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of ....., 1978, I served three copies of the foregoing Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Ohio on William J. Brown and John C. Duffy, Jr., State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, attorneys for Petitioner Edgar L. Lindley, Petitioner herein, by mailing such copies to said attorneys in a properly addressed envelop with certified mail prepaid.

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C. EMORY GLANDER